

**IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS**

AMANDA JANE WOLFE, et al.

Petitioners,

v.

DENIS MCDONOUGH,

Respondent.

No. 18-6091

**REPORT AND RECOMMENDATION
OF SPECIAL MASTER**

This matter is before me on Plaintiffs’ Request for Improvements to VA’s Re-Adjudication and Reporting Procedures (“Request”) filed July 9, 2021. In that request, Plaintiffs asked for two forms of relief. First, they asked VA to add to the notice letters it sends to inform veterans that their claims have been re-adjudicated the amount that VA owes as well as the Explanation of Benefits (“EOB”) upon which the decision was based. Second, Plaintiffs request that VA provide: (1) a copy of each re-adjudication decision and notice letter informing the veteran of the re-adjudication decision issued since the last status report; (2) a spreadsheet listing the class member whose case was re-adjudicated, a description of the relief granted, and the amount of money still owed by VA; and (3) certain information about those class members the VA has been unable to locate to make the payment required. The Secretary submitted a response on July 16, 2021 (“Response”), in which VA agreed to the first request and objected to the second. Plaintiffs submitted a reply on July 27, 2021 (“Reply”). I now submit this Report and Recommendation

pursuant to this Court's August 5, 2021, order regarding the second issue. Having considered the arguments of counsel, and for the reasons that follow, I recommend the Court grant Plaintiffs' Request.

Plaintiffs first argue that VA's 45-day status reports, called for by this Court's April 6, 2020, Order do not provide sufficient information for class counsel to monitor VA's compliance with this Court's orders. They assert that VA has consistently failed to accurately report how many of the class claims it has adjudicated. Request at 2. Class counsel explains that VA's reports have changed over time with certain veterans being removed from them even if VA previously reported their claims as fully adjudicated and even though the reports are cumulative. *Id.* at 6. Class counsel also cites a survey they conducted of a random sample of 200 veterans whose claims VA says have been re-adjudicated. Reply at 5–6. According to class counsel, only four of the class members surveyed reported that they had received a re-adjudication decision and payment, 32 have received no correspondence from VA, and the surveys sent to 13 of the class members were returned as undeliverable even though they were mailed to the addresses provided by VA. *Id.* Further, class counsel discusses three specific cases in which VA either failed to pay a claim re-adjudicated in the veteran's favor or has done so only after class counsel alerted VA to the error. Reply at 5. Class counsel argues these errors show that VA's reports do not provide enough information for class counsel to monitor VA's compliance. Request at 8.

VA disagrees, asserting that class counsel's intervention is not necessary to ensure VA's compliance because it is entitled to a presumption of regularity and class counsel has not provided sufficient evidence to rebut that presumption. The presumption of regularity presumes that "government officials 'have properly discharged their official duties.'" *Ashley v. Derwinski*, 2 Vet. App. 307, 308 (1992) (quoting *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14–15

(1926)). But “[t]he presumption of regularity is not absolute; it may be rebutted by the submission of ‘clear evidence to the contrary.’” *Id.* Evidence that a veteran has not received a benefit, standing alone, is not sufficient to overcome the presumption, but there is where clear evidence establishes that VA officials have not properly discharged their duties. *Id.* at 309; *see also Sthele v. Principi*, 19 Vet. App. 11, 17 (2004) (“multiple irregularities in VA’s handling of the appellant’s case . . . coupled with the appellant’s assertion of nonreceipt, constitute the clear evidence that is necessary to rebut the presumption of regularity”); *Wagner v. Geren*, 614 F. Supp. 2d 12, 20 (D.D.C. 2009) (finding miscalculation of plaintiff’s service time, incorrect statutory authority, and a missing form sufficient to rebut presumption of regularity). If the presumption is rebutted, the burden shifts to the Secretary to show the contrary. *Id.*

As an initial matter, it is unclear how and to what extent the presumption of regularity applies in this dispute given that this Court has already instructed class counsel to monitor VA’s compliance with this Court’s orders. April 6, 2020, Order, at 3. If VA’s procedures were entitled to a presumption of regularity, there would be little if any need for class counsel to monitor VA’s compliance.

Even if the presumption applies, however, I find that it is rebutted. Class counsel has provided evidence of three specific instances in which VA failed to make accurate and timely payments owed to veterans. In the first case, the veteran received a letter dated June 1, 2020, which identified a May 19–21, 2018, episode of care for which VA owes the veteran \$1,340. Class counsel asserts that amount has not been paid. VA’s only response is to rely on a reimbursement decision dated February 2021, based on which VA paid the veteran \$39.20 in January 2021. VA claims that class counsel’s only complaint is that the veteran was paid before the reimbursement decision, but that is not the problem class counsel has identified. Class counsel has shown that the

\$1,340 for the May 19–21, 2018, episode of care has not been paid, and VA has provided no evidence that it has. Reply at 3; Response 2–3. In the second case, VA admits that payment was made to the wrong payee and that the issue was corrected. Response at 3. But the issue was corrected only after VA was required to provide class counsel with the decision granting reimbursement. Reply at 4. In the third case, the veteran admits that he is not certain whether he received a payment. He simply cannot recall. Even so, VA will not confirm whether the check was cashed. Reply at 4–5.

In addition, 89% of those who responded to class counsel’s survey report that not all their claims have been re-adjudicated even though VA’s May status report claims they were. Rather than dispute the point, VA argues that class counsel lacks authority to survey veterans to determine whether or not they were paid. Response at 11. I disagree. The Court has given class counsel authority to monitor VA’s compliance with the Court’s orders. Asking class members whether VA has done so is an integral part of that responsibility.

Finally, class counsel has shown errors in VA’s status reports as well. They have shown that VA has removed certain veterans from the “all claims adjudicated” designation despite the fact that the reports are intended to be cumulative and identify all veterans whose claims have been re-adjudicated, not just those who have had their claims decided in the last 45 days. *Id.* at 6. VA responds that the status reports are a work in progress and that the revisions it has made are due to internal audits. Response at 9. That may well be true, but as things stand now, class counsel has no way to monitor whether VA’s reports accurately reflect what is happening to veterans’ claims. The errors in the 45-day reports combined with the evidence that many veterans whom VA reports as having all claims adjudicated have received no contact from VA at all, let alone payment where appropriate, is sufficient to rebut the presumption of regularity. Accordingly, I find that VA should

be required to provide additional information to allow class counsel to effectively monitor VA's compliance.

At present, VA's status reports include the name of the veteran, his or her state, and whether some or all of the veteran's claims have been re-adjudicated. Class counsel requests that VA also provide a copy of all past and future re-adjudication decisions made during the reporting period as well as the date and payment method for those veterans now listed as having all claims adjudicated. *Id.* Class counsel argues that providing copies of VA's re-adjudication decisions will allow them to better monitor which class members have been paid and when they were paid. *Id.*

Class counsel has noted that the manner of reporting they request is consistent with the procedure agreed to by VA in another class action, *Nehmer v. U.S. Dep't of Veterans Affairs*, No. C 86-06160 WHA, 2020 WL 6508529 (N.D. Cal. Nov. 5, 2020). Request at 8; Reply at 6–7. In that case, VA agreed to provide status reports, including (1) a copy of each re-adjudication decision and notice letter issued since the last status report; (2) a spreadsheet listing the class member, a description of the relief granted, and the amount of money owed; and (3) detailed information about those class members whom VA had been unable to locate to pay. Reply at 7. Class counsel is willing to follow the same procedures in this case. *Id.* That VA agreed to these procedures in *Nehmer* is persuasive evidence that such procedures are not unduly burdensome, and in fact, VA has not argued that they are.

VA argues, instead, that granting the relief requested while VA's appeal of this Court's September 9, 2019, decision and April 15, 2020, is pending would be an inappropriate expansion of the rights and responsibilities of the parties set forth in this Court's orders. VA points to the Court's March 24, 2021 order, which recognized that "[o]nce an appeal has been taken, [the court is] without authority to change the rights and obligations of the parties under the order before a

higher court.” VA Response at 7 (citing March 24, 2021, CAVC Order, at 3). VA also notes that the Court limited the Special Master’s authority to expand or change in any way the terms of the Court’s order. *Id.* at 8 (citing March 24, 2021, CAVC Order, at 6). VA asserts that because the Court’s order required VA to provide “an update on the readjudication of class members’ claim using the categories of claimants the parties set forth in their Joint Response,” requiring VA to provide any additional information would change the rights and obligations of the parties under the order. *Id.* at 8 (quoting CAVC April 6, 2020, Order, at 4).

The Court’s order, however, instructed VA to provide an update on the re-adjudication of class claims. The order did not specify precisely what information must be included in that update. VA admits that adjusting the “format” of the status reports would not alter the rights and obligations of the parties, but argues that requiring it to provide re-adjudication decisions would. *See* Response at 11. And yet VA provides no authority for that distinction. The Court’s order states that “[the Court] believe[s] that class counsel should be able to monitor the Secretary’s compliance with the relief we have ordered in this matter.” April 6, 2020, Order, at 3. And for that reason, the Court “order[ed] that every 45 days after the Secretary has begun readjudications under the terms of this order, he shall serve a status report on class counsel providing an update on the readjudication of class members’ claims using the categories of claimants the parties set forth in their Joint Response.” April 6, 2020, Order, at 3. The order provides only that such update must follow the categories of claimants set forth in the Joint Response. The relief requested here does not alter the categories of claimants. The Court’s order also made clear that the status reports were to assist class counsel in monitoring VA’s compliance, and the relief requested here is consistent with that purpose.

VA also argues that class counsel's request for information whether and when veterans have actually been reimbursed exceeds their role by "focusing on the minutiae of individual Veterans' claims" rather than monitoring VA's compliance. Response at 11. However, as the Court and VA have acknowledged, April 6, 2020, Order, at 3; Response at 12, VA's obligation to re-adjudicate claims also includes an obligation to pay the veteran any reimbursement owed. *See* Order of March 24, 2021 (Falvey, J., concurring) ("[H]aving found the regulation invalid, our orders required VA to readjudicate class members' claims *and reimburse veterans* for coinsurance and deductibles, and provide class counsel with periodic status reports.") (emphasis added) (footnotes omitted); VA Resp. in Opp. Pets.' Mot. for Appointment of a Special, at 4 (Nov. 11, 2020) ("VA has fully operationalized and implemented the Court's September 9, 2019 order *requiring the agency to reimburse Veterans* for coinsurance and deductibles and is actively readjudicating class members' claims.") (emphasis added). Class counsel operates within their defined role when they seek to monitor whether VA is re-adjudicating and paying claims. VA asserts that class counsel is "focusing on the minutiae of individual Veterans' claims at the agency level . . . on the *merits*." Response at 11–12 (emphasis added). But VA has provided no evidence that class counsel has intervened in any decision whether to grant or deny a claim. Class counsel is monitoring, and has requested information necessary for them to monitor, only whether VA has made a re-adjudication decision and, where payment is owed, whether payment has been made.

For the foregoing reasons, I recommend the court grant Plaintiffs' Request for Improvements to VA's Re-Adjudication and Reporting Procedures and order VA to include the following in all future 45-day status reports:

- A copy of each re-adjudication decision and notice letter issued since the last status report;

- A spreadsheet listing the class member, a description of the relief granted, and the amount of money owed; and
- The name of class members VA has been unable to locate for purposes of making the payment required as well as a description of VA's efforts to contact the class member.

In the first 45-day status report following entry of the Court's order, VA shall also provide a copy re-adjudication decisions that pre-date the issuance of the Court's order granting the relief requested. As the parties have agreed, VA shall also amend its notice to class members to include (1) the amount, if any, that VA has calculated it owes the veteran in the body of the letter and (2) the EOB upon which the decision was based as an enclosure.

Entered: August 11, 2021

A handwritten signature in blue ink, reading "Thomas B. Griffith".

Thomas B. Griffith
Special Master